Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

(8)

No. 95-938

In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

YUEH-SHAIO YANG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS - IMMIGRANT AND REFUGEE RIGHTS PROJECT AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENT

SANDRA E. KUPELIAN
Counsel of Record
CASSIDAY, SCHADE & GLOOR
333 West Wacker Drive
Suite 1200
Chicago, Illinois
60606-1289
(312) 641-3100

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

INTRODUCTION 3

ARGUMENT:

The Attorney General exceeded the bounds of the authority delegated to her under Section 241(a)(1)(H) by considering the elements of fraud for which the Respondent sought forgiveness in making her waiver determination 5

A. The Attorney General's discretion is not unfettered; her discretion must be exercised within the parameters established by Section 241(a)(1)(H) 7

1. The statutory language of Section 241(a)(1)(H) and its legislative history and development define the "form" within which the Attorney General must exercise her authority 9

a. The language of Section 241(a)(1)(H) and this Court's decision in *INS v. Errico* preclude any consideration of the wrong for which the alien seeks forgiveness 11

b. The legislative history and development of Section 241(a)(1)(H) is consistent with the limitations on the Attorney General's discretion formed by the statute 17

TABLE OF CONTENTS – Continued

Page

2. The authority cited by the Attorney General is unpersuasive and only serves to establish that the Court of Appeals acted correctly in reversing the Attorney General's decision .. 18

B. Our system of government requires the judiciary to police the parameters of the authority delegated to executive agencies 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) 24

Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89 (1983) 24

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 8, 10

Costello v. INS, 376 U.S. 120 (1964) 16

Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) 6

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 25

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 16

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) 18

Guillen-Garcia v. INS, 60 F.3d 340 (7th Cir. 1995)..... 6

Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966) ..... *passim*

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 9, 10, 11, 12, 16, 23

INS v. Doherty, 502 U.S. 314 (1992).....18, 25

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 11

INS v. Jong Ha Wang, 450 U.S. 139 (1981) 18, 19, 20

INS v. Phinpathya, 464 U.S. 183 (1984)..... 11, 12, 21

INS v. Rios-Pineda, 471 U.S. 444 (1985) 18

Jay v. Boyd, 351 U.S. 345 (1956) 18

TABLE OF AUTHORITIES – Continued

Page

Liwanag v. INS, 872 F.2d 685 (5th Cir. 1989) 15

NLRB v. Brown, 380 U.S. 278 (1965) 24

Rusello v. United States, 464 U.S. 16 (1983) 23

United States v. Alaska, 503 U.S. 569 (1992) 18, 21

United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972) 23

United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950) 8

STATUTES AND REGULATIONS:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

§ 208(a), 8 U.S.C. 1158(a) 9

§ 241(a)(1)(H), 8 U.S.C 1251(a)(1)(H) ..... *passim*

§ 243(h), 8 U.S.C. 1253(h) 9

§ 244(a)(1), 8 U.S.C. 1254(a)(1) 20

§ 245, 8 U.S.C. 1255 19

8 C.F.R.:

Section 2.1 5

Section 3.0 5

Section 3.1(a) 5

Section 3.1(b) 5

Section 3.10 5

Section 242.8 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT (1994) 4

Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, Article III*, 101 Harv. L. Rev. 915, 938 (1988) 24

The Federalist No. 47 (J. Madison) (C. Rossiter ed. 1961) 24

The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961) 24

INTEREST OF *AMICI CURIAE*

The American Immigration Lawyers Association (AILA); the Lawyers' Committee for Civil Rights Under Law of Texas, Immigrant and Refugee Rights Project (Texas Lawyers' Committee); and the National Immigration Project of the National Lawyers Guild (National Immigration Project) submit this brief as *amici curiae* in support of the Respondent's Brief with the consent of all parties.

Amicus AILA, founded in 1946, is a national non-profit association of immigration and nationality lawyers with 34 chapters across the United States and Canada including over 4,200 members. AILA is an affiliated organization of the American Bar Association. Its objectives are to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

Amicus Texas Lawyers' Committee, founded in 1991, is part of a national network of non-partisan, non-profit offices established originally in 1963 at the request of President John F. Kennedy to provide legal services to victims of racial discrimination. The Texas Lawyers' Committee is dedicated to defending the rights of immigrants by engaging in class action litigation, appellate advocacy and community education.

Amicus National Immigration Project is a national organization of attorneys, law students and paralegals engaged in legal projects of public concern to promote the fair and humane administration of justice relating to

immigration, nationality and refugee law. Its goal is to enable citizens to exercise their civil and constitutional rights, regardless of race, religion, nationality, gender or economic position.

Amici maintain a profound interest in the development of sound precedent regarding the availability of humanitarian relief from deportation and the preservation of meaningful judicial review of agency decisions. Amici are particularly concerned when public sentiment has entrenched itself against an identifiable group of individuals, as it has against immigrants in the United States, that the judiciary be especially rigorous in enforcing statutory limits on the exercise of agency discretion.

SUMMARY OF ARGUMENT

The Court of Appeals properly enforced the limits on the Attorney General's discretion proscribed by Section 241(a)(1)(H) of the Immigration and Nationality Act when it reversed the decision of her delegate, the Board of Immigration Appeals, in this case. 8 U.S.C. 1251(a)(1)(H). The language of Section 241(a)(1)(H), its legislative history and development and its purpose circumscribe the parameters within which the Attorney General must exercise her discretion.

The inclusion of the language "otherwise admissible" in Section 241(a)(1)(H) reveals that Congress intended to remove any consideration of the elements of fraud that triggered the need for the waiver, both in determining initial eligibility and in assessing whether relief is warranted. See *Immigration and Naturalization Service v. Errico,*

385 U.S. 214 (1966). The history and development of Section 241(a)(1)(H) confirm the limitations proscribed by its language. From its inception, the primary purpose of the statute was to grant exceptions to the restrictive sections of the Act for the purpose of keeping families together. *Id.* at 220. Recent amendments to Section 241(a)(1)(H) have actually broadened the application of the waiver in an effort to insure that its humanitarian goals are met.

The Board's consideration of the elements of the Respondent's fraudulent entry in determining whether relief was warranted under Section 241(a)(1)(H) in the instant case contravened the language and purpose of the statute. Although relief under Section 241(a)(1)(H) is discretionary, discretion is not abdication and must be exercised within the limits set by Congress. In reversing the decision of the Board of Immigration Appeals, the Court of Appeals was performing its constitutionally required function to police the parameters of the authority delegated to the Attorney General under Section 241(a)(1)(H).

INTRODUCTION

The United States continues to thrive with the tremendous infusion of energy and talent of recent immigrants. However, the current anti-immigrant sentiment prevailing in the United States ignores these contributions and many others. In this climate, misperceptions abound. For example, much of the public believes that immigrants are more likely to receive public benefits than U.S. citizens, and that immigrants take away jobs from

U.S. citizens, when the opposite is actually true.[1] Immigrants today are perceived to be less educated than the native population, when, in fact, recent legal immigrants are more likely to hold a college degree (thirty-three percent) than natives (twenty percent).[2] Such misperceptions are typical of the current overreaction to immigration and only serve to fuel hostility toward this uniquely vulnerable group.[3]

It is especially when a particular group of individuals, such as recent arrivals to the United States, is the object of significant public and political anger that a vigorous and independent judiciary is required to function as a meaningful check on the actions of the executive branch charged with administering this country's laws.

---

[1] In a 1994 study by the Urban Institute, it was shown that non-refugee immigrants of working age are considerably less likely to use welfare (2 percent) than natives of working age (3.7 percent). MICHAEL FIX & JEFFERY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 63 (1994). It was also shown that given expenditures on U.S. goods and services and the number of new businesses started, immigrants actually create more jobs than they fill. *Id.* at 47.

[2] *Id.* at 34.

[3] Another example of how immigration issues are distorted can be found in the statement of interest in the brief submitted by *amicus curiae* in support of the Petitioner. *Amicus* express interest in the instant case based on its concern for crime prevention. This stated interest is puzzling given that this case presents no criminal issues, and, in fact, involves the interpretation of an ameliorative provision based on family unification applied in the civil immigration context.

The Ninth Circuit Court of Appeals performed this crucial function when it reversed the decision of the Board of Immigration Appeals in this case.

ARGUMENT

THE ATTORNEY GENERAL EXCEEDED THE BOUNDS OF THE AUTHORITY DELEGATED TO HER UNDER SECTION 241(a)(1)(H) BY CONSIDERING THE ELEMENTS OF FRAUD FOR WHICH THE RESPONDENT SOUGHT FORGIVENESS IN MAKING HER WAIVER DETERMINATION.

Contrary to the contentions of the Petitioner, this is not a case in which the Court of Appeals encroached upon the unfettered discretion of the Attorney General to make family waiver determinations under Section 241(a)(1)(H) of the Immigration and Nationality Act (hereafter "INA" or "Act").[4] 8 U.S.C. 1251(a)(1)(H). Rather, this is a case in which the Attorney General exceeded the parameters of the authority delegated to her by Congress by considering illegal and impermissible factors in making the family waiver determination. It

---

[4] As set forth in the Petitioner's Brief at p. 17, n.10, the Attorney General has delegated her authority to direct the administration of the INS and to enforce the INA and other laws relating to the immigration and naturalization of aliens to the Commissioner of the INS, 8 C.F.R. 2.1, and the Executive Office for Immigration Review, which includes the Board of Immigration Appeals (BIA), 8 C.F.R. 3.0, 3.1(a) and (b), and immigration judges, 8 C.F.R. 3.10, 242.8. All references to the Attorney General contained herein are made with regard to the Attorney General and her delegates.

does not involve the review of an application of the Attorney General's discretion to specific facts. Therefore, the Court of Appeals was properly enforcing the limits on the Attorney General's discretion proscribed by the statute when it reversed her decision in this case.

It is true that the Attorney General may, in her discretion, select factors to be considered in making waiver determinations under Section 241(a)(1)(H). However, the Attorney General's power to identify those factors is bounded by the authority delegated to her by the statute. The language of Section 241(a)(1)(H), its legislative history and its purpose circumscribe the parameters within which the Attorney General must exercise her discretion.

The Attorney General's assertion that Congress has placed no restrictions on the exercise of her discretion, and, therefore, has vested her with unfettered discretion to make family waiver determinations is wholly erroneous. The Attorney General's decision may be reversed whenever her actions are arbitrary, irrational, not in accordance with the law or rest on an impermissible basis. *Diaz-Resendez v. INS*, 960 F.2d 493, 495 (5th Cir. 1992); *Guillen-Garcia v. INS*, 60 F.3d 340, 344 (7th Cir. 1995). To determine whether her decision rests on an impermissible basis, the judiciary must assess whether the statute constrains the Attorney General's discretion, and, if so, to what extent. Under the circumstances presented in this case, the Court of Appeals correctly reversed the Attorney General's decision because she exceeded the limits of her authority by considering factors contrary to the language and purpose of Section 241(a)(1)(H) of the Act.

A. THE ATTORNEY GENERAL'S DISCRETION IS NOT UNFETTERED; HER DISCRETION MUST BE EXERCISED WITHIN THE PARAMETERS ESTABLISHED BY SECTION 241(a)(1)(H).

The Attorney General improperly frames the issue in this case as one involving a review of the exercise of her unfettered discretion to make waiver determinations under Section 241(a)(1)(H), and, therefore, contends the judiciary should have simply deferred to her decision. She asserts that her authority to forgive fraud or misrepresentations at the time of entry should be viewed as a "matter of grace," according to her "unfettered discretion." See Petitioner's Brief at 18-19. Further, she construes Section 241(a)(1)(H) to commit the selection of factors in making this determination entirely to her discretion. Given this statutory construction, she posits that she would be justified in considering, along with other positive and negative factors, the nature and gravity of the initial fraud or misrepresentation which renders the alien deportable in the first instance, but, that, in her discretion, she has adopted a more lenient policy in which she elects not to do so. See Petitioner's Brief at 24. In fact, both the Attorney General and the *amicus curiae* in support of the Attorney General appear to assert that the Attorney General's decision in this case is altogether unreviewable.

However, this case involves the Attorney General's statutory interpretation of Section 241(a)(1)(H) in identifying the factors to be considered in making a waiver determination, and, therefore, the issue presented is one of statutory construction. The inquiry must focus on

whether the Attorney General's exercise of discretion rests on an impermissible basis or exceeds the bounds of her authority. To make this determination, the judiciary must analyze Section 241(a)(1)(H) to identify whether the provision limits the Attorney General's exercise of discretion.[5] The judiciary, not the Attorney General, is the final authority on whether the Board of Immigration Appeals' (BIA or Board) interpretation of Section 241(a)(1)(H) was proper. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778 (1984).[6]

---

[5] Even the case cited by Petitioner for the proposition that the discretion of the Attorney General with respect to suspension of deportation is like "a judge's power to suspend the execution of a sentence or a President's power to pardon a convict", *U.S. ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.), emphasizes that, "[I]t is a matter of grace *** ***unless – as we are assuming – it affirmatively appears the denial has been actuated by considerations that Congress could not have intended to make relevant.***" *Id.*

[6] Under this Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842, when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. The first question is always whether Congress has directly spoken to the precise issue presented. For, if the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress and the analysis goes no further. *Chevron*, 467 U.S. at 842-43. If, however, the statute is silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

1. The Statutory Language Of Section 241(a)(1)(H) And Its Legislative History And Development Define The "Form" Within Which The Attorney General Must Exercise Her Authority.

The proper method of analysis to be utilized in assessing the Attorney General's interpretation of Section 241(a)(1)(H) is set forth in this Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Just as in this case, the heart of the issue presented in *Cardoza-Fonseca* pertained to the parameters within which the then Attorney General could exercise his authority.

Specifically, at issue was whether the same standard of proof applied to claims to asylum under Section 208(a) and to claims to a withholding of deportation under Section 243(h) of the Act. 8 U.S.C. 1158(a), 1253(h). The BIA concluded that the same standard was applicable to both sections, and, therefore, that an alien must prove that he is "more likely than not" to be subject to persecution in his home country under Section 208(a). *Id.* at 423. The Ninth Circuit Court of Appeals rejected this interpretation of the statute. This Court affirmed the decision of the Court of Appeals.

The Attorney General's argument in *Cardoza-Fonseca* was twofold. First, the Attorney General argued that the structure of the Act itself dictated a decision in its favor. *Id.* at 443. Second, the Attorney General argued that the BIA's construction of the Act was entitled to substantial deference, even if the Court of Appeals' reading of the statute was more in keeping with Congress' intent. *Id.* at 445. This Court rejected both arguments stating, "the first

ignores the structure of the Act; the second misconstrues the federal courts' role in reviewing an agency's statutory construction." *Cardoza-Fonseca*, 480 U.S. at 443.

Citing *Chevron*, this Court emphasized that the issue presented was a question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, this Court concluded that Congress did not intend the two standards of proof to be identical. *Id.* at 446-447. Noting that the vesting of discretion in the Attorney General is typical in the immigration area, this Court, nonetheless, explicitly rejected the Attorney General's contention that the BIA's construction of the statute was entitled to substantial deference since the case was one of statutory construction. *Id.* at 444, 445.

Thus, this Court recognized that it was well within the province of the judiciary to enforce the limits on the Attorney General's authority set forth in the language of the statute. *Id.* at 448. While stopping short of giving substance to the term "well founded fear", this Court rejected the BIA's interpretation of the phrase and directed the agency to the appropriate sources from which it should derive the proper meaning. *Id.* at 432-43, 446. Those sources included the plain language of the statute, its legislative history and other sources of international law and scholarship. *Id.* at 432-43. In other words, this Court found that the Ninth Circuit properly policed the parameters of the Attorney General's authority proscribed by Congress under the statute.

In a separate concurrence, Justice Blackmun noted that, although the final contours of the standard are to be shaped by the standard's application to facts of specific

cases, ***the form of the standard was at first given by the statutory language and the intimations of the legislative history.*** *Id.* at 451-52 (Blackmun, J., concurring). Therefore, it was well within the province of the Court of Appeals to insure that the then Attorney General exercised his authority within that form.

Under the forgoing analysis, the Attorney General's interpretation of Section 241(a)(1)(H) must similarly be rejected here because the Attorney General's conclusion that the statute imposes no limits on her discretion "ignores the structure of the Act" and "misconstrues the federal courts' role in reviewing an agency's statutory construction." *Cardoza-Fonseca*, 480 U.S. at 443. As set forth below, the language of Section 241(a)(1)(H) and its legislative development form the parameters of the authority within which the Attorney General may make family waiver determinations. Accordingly, the Court of Appeals acted well within its authority in enforcing the boundaries of the Attorney General's exercise of her discretion.

a. The Language Of Section 241(a)(1)(H) And This Court's Decision In *INS v. Errico* Preclude Any Consideration Of The Wrong For Which The Alien Seeks Forgiveness.

In all cases involving statutory construction, the starting point must be the language employed by Congress. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Elias-Zacarias*, 502 U.S.

478, 482 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. at 189. Section 241(a)(1)(H) of the INA provides that an alien who has procured his or her entry into the United States by fraud or misrepresentation, either willful or innocent, may seek a waiver of deportation if that alien:

> (i) is the spouse parent son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (ii) was in possession of an immigrant visa or equivalent document and was ***otherwise admissible*** to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs 5(A) and 7(A) of section 1182 of this title which were a direct result of that fraud or misrepresentation.

8 U.S.C. 1251(a)(1)(H) (***emphasis added***).

The Attorney General contends that this language merely sets forth the "eligibility requirements" for the application of the family waiver and places *no* restrictions whatsoever on the factors that may be considered by the Attorney General and her delegates in making a waiver determination. Petitioner's Brief at 16-17. The Attorney General concludes, therefore, "that section 241(a)(1)(H) on its face, vests the Attorney General with essentially unfettered discretion." Petitioner's Brief at 17. However, this argument ignores the meaning of the phrase "otherwise admissible" and this Court's decision in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966).

It is true that Section 241(a)(1)(H) sets forth the requirements necessary for the application of a family

waiver. It provides, in pertinent part, that the applicant must be a spouse, parent, or child of a citizen or a lawful permanent resident, and that the applicant was in possession of an immigrant visa or equivalent document and was *"otherwise admissible"* at the time of entry. 8 U.S.C. 1251(a)(1)(H). Given its plain and ordinary meaning, the use of the language "otherwise admissible" reveals that Congress intended to remove any consideration of the elements of fraud triggering the need for the waiver, both in determining initial eligibility and in assessing whether the applicant merits discretionary relief.

This meaning is clear in light of the very structure of Section 241(a)(1)(H), which provides that an alien who has "procured his or her entry into the United States by fraud or misrepresentation, either willful or innocent" may seek a waiver of deportation if that alien has the requisite family ties and was "otherwise admissible" – meaning admissible aside from the elements of the fraudulent entry. A fraudulent entry necessarily involves several steps in its planning and execution. The structure of the statute reveals that the separate elements of the fraud or misrepresentations made as a part of a fraudulent scheme to enter the United States should not be held against the alien in making the family waiver determination. Any other construction of Section 241(a)(1)(H) would render the phrase "otherwise admissible" meaningless.

In fact, the meaning of the phrase "otherwise admissible" was examined by this Court in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). In that case, the Board of Immigration Appeals affirmed a deportation order against an alien who had falsely represented

that he was a skilled mechanic with specialized experience in repairing foreign automobiles. On the basis of that misrepresentation, he was granted first preference quota status and entered the country with his wife in 1959. The couple had a child in 1960 who acquired U.S. citizenship at birth. The government began deportation proceedings against Errico in 1963. Errico argued that the provisions of Section 241(f) of the INA (now 241(a)(1)(H)) saved him from deportation.

The BIA ruled that relief under Section 241(f) was not available because Errico had not complied with quota requirements, and, hence, was not "otherwise admissible at the time of entry".[7] *Errico*, 385 U.S. at 216. The Ninth Circuit Court of Appeals held that the construction of the statute adopted by the Board would strip it of practically all meaning, since a material misrepresentation would presumably be given to conceal some factor that would bear on admissibility, and reversed the BIA decision. *Id.*

After close attention to the language of 241(f) and its predecessor, as well as the legislative history of those provisions, a majority of this Court concluded:

---

[7] Under the Attorney General's position in this case, the BIA could have considered all the separate elements of Errico's fraudulent entry, including his evasion of the quota requirements, his own fraudulent entry, and his wife's fraudulent entry which was gained through his. However, it does not appear that the Attorney General unnaturally divided Errico's conduct into separate elements of fraud to be weighed as negative factors. See *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). For a detailed discussion of the Attorney General's inappropriately narrow definition of "fraud", see Section III of the Respondent's Brief.

> This language would be meaningless if an alien who committed fraud for the purpose of evading quota restrictions would be deportable as not 'otherwise admissible at the time of entry.'

Id. at 222-23. This Court emphasized that it was clear from the language of Section 241(f) that aliens who are close relatives of U.S. citizens are not required to comply with quota restrictions to escape deportation for their fraud and that nothing in the legislative history suggested Congress had a contrary result in mind. *Id.* at 223.

Thus, this Court recognized that for the statute to achieve its purpose, the "wrong" for which the applicant sought to be forgiven must be set aside in determining whether the applicant merits relief. In so ruling, this Court noted that the INA was not a punitive statute and that Section 241(f), in particular, was designed to accomplish a humanitarian result – uniting families. *Id.* at 225. Even Justice Stewart, in his dissent, agreed that the plain meaning of the phrase "otherwise admissible" required that fraud be removed as a ground for deportation. *Id.* at 229 (Stewart, J., *dissenting*).[8]

The *Errico* court's reading of the plain meaning of the phrase "otherwise admissible" remains valid today. Although Section 241(f) has been amended since the *Errico* decision, the phrase "otherwise admissible" has

---

[8] Similarly, in *Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989), the Court of Appeals stated that the waiver "presupposes that the petitioner has committed an act justifying deportation. In its brief, the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation."

been preserved, and, in fact, the application of the waiver has been expanded.[9] At no time has Congress expressed a desire to depart from this Court's interpretation of the plain meaning of the phrase or from the humanitarian goal of uniting families originally sought to be achieved by the inclusion of such language.

It is clear from the plain meaning of Section 241(a)(1)(H) that Congress set limits on the Attorney General's exercise of discretion in making family waiver determinations. Thus, the Attorney General's assertion that the statute does not limit her discretion is contrary to the plain meaning of Section 241(a)(1)(H) and the clear intent of Congress.[10]

Therefore, the Court of Appeal's reversal of the BIA's decision in this case does not reflect an encroachment upon the authority of the Attorney General to select and weigh factors, but, rather, a proper exercise of its function to police the boundaries within which the Attorney General may exercise her discretion. The Court of Appeals properly rejected the Attorney General's construction of Section 241(a)(1)(H), which is contrary to the plain meaning and purpose of the statute.

---

[9] A detailed analysis of the history, development and expansion of Section 241(a)(1)(H) is contained in Section I of Respondent's Brief.

[10] The plain meaning of the statute is clear without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)

b. The Legislative History And Development Of Section 241(a)(1)(H) Is Consistent With The Limitations On The Attorney General's Discretion Formed By The Statute.

The limitations set by the plain meaning of the language of Section 241(a)(1)(H) are only confirmed by an examination of its history and development. A thorough and detailed analysis of the history and development of Section 241(a)(1)(H) is contained in Section I of the Respondent's Brief and will not be set forth again here. However, it should be emphasized that from its inception, Section 7 of the 1957 Act, which later evolved into Section 241(f) and then Section 241(a)(1)(H), was intended "plainly to grant exceptions to the rigorous provisions of the 1952 Act *for the purpose of keeping family units together.*" *INS v. Errico*, 385 U.S. 214, 220 (1966). Describing the purpose underlying Section 241(a)(1)(H), the *Errico* Court stated:

> Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.

Id.

Consistent with this intent, the waiver and its application have been broadened by amendments to the Act in 1981 and again in 1990. See Section I of Respondent's Brief. Therefore, the Attorney General's restrictive application of the waiver in this case, which involved the consideration of elements of the initial fraudulent entry,

contravened the intent of Congress in creating and expanding the waiver.

2. The Authority Cited By The Attorney General Is Unpersuasive And Only Serves To Establish That The Court Of Appeals Acted Correctly In Reversing The Attorney General's Decision.

Most of the cases cited by the Attorney General in support of her position are not cases involving the interpretation of a statutory provision and the enforcement of the statutory limits on her authority to identify the factors to be considered in the exercise of her discretion. Rather, the balance of the cases cited in the Petitioner's Brief involve judicial review of the application of the Attorney General's discretion to the facts of specific cases. See *e.g. Jay v. Boyd*, 351 U.S. 345, 76 S.Ct. 919 (1956); *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 84 S.Ct. 306 (1963); *INS v. Rios-Pineda*, 471 U.S. 444, 105 S.Ct. 2098 (1985); *INS v. Doherty*, 502 U.S. 314, 112 S.Ct. 719 (1992). This distinction is critical to a proper analysis of the issues in this case because the latter does not require an analysis of the statutory provision at issue, a function involving heightened judicial review and less deference to the Attorney General's decision. Moreover, two of the cases relied upon by the Attorney General in which the interpretation of a statute was at issue, *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curium) and *United States v. Alaska*, 503 U.S. 569, 576 (1992), actually support the Court of Appeal's decision in this case.

At issue in *Wang* was the propriety of the Court of Appeals' decision to order that deportation proceedings be reopened. The *Wang* case appears to support the Attorney General's position in this case because it was ultimately determined that the Court of Appeals had encroached upon the authority of the Attorney General in ordering that the case be reopened. However, the opposite is true. *Wang* demonstrates that, in determining whether the Attorney General acted properly, her actions must be evaluated in light of the meaning of the language employed and the intent of Congress.

The respondents in *Wang* were ordered deported in November 1974 and were granted the privilege of voluntarily departing by February 1, 1975. *Wang*, 450 U.S. at 141. Instead of departing voluntarily, they applied for an adjustment under Section 245 of the Act, 8 U.S.C. 1255, but were found ineligible on July 17, 1975. *Id.* at 141-42. Their appeal from this ruling was dismissed by the BIA in October 1977. Respondents, by that time, had satisfied the 7-year continuous-physical-presence requirement under Section 244 of the Act and filed a second motion to reopen to hear the suspension of deportation claim. *Id.* at 142.[11]

Section 244 of the INA provides that the Attorney General may, in her discretion, suspend deportation and adjust the status of an otherwise deportable alien who: (1)

---

[11] Unlike the relief sought in this case, the relief sought by the respondent in *Wang* – a reopening of proceedings – is not provided for by Congress in the INA itself. Rather, such relief is provided for only in the regulations promulgated by the Attorney General under the Act.

had been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a)(1). The Wangs' motion contained unverified allegations that the deportation would result in extreme hardship to their children and would also be an economic hardship to the entire family. *Wang*, 450 U.S. at 142. The BIA denied the motion to reopen without a hearing, finding that respondents failed to establish a *prima facie* case to entitle them to discretionary relief under the Act. *Id.* at 142-43. The Court of Appeals, sitting *en banc*, reversed and remanded for a hearing under Section 244 of the Act. *Id.* at 143.

This Court concluded that the Court of Appeals erred in reversing the case in two respects. First, the Court of Appeals ignored the regulation that required the alien seeking suspension to allege and support by affidavit, or other evidentiary material, the particular facts claimed to constitute extreme hardship. *Id.* at 143. Second, and more importantly, the Court of Appeals encroached on the authority which the Act confers on the Attorney General. *Id.* at 144.

This Court looked to the then Attorney General's interpretation of the words "extreme hardship", noting that his construction and application of this standard should not be overturned by a reviewing court merely because it prefers another interpretation. *Id.* at 145.

Acknowledging that the Attorney General's interpretation was narrow, the Court emphasized that such a narrow interpretation was consistent with the "extreme hardship" language, which itself indicated the exceptional nature of the suspension remedy. *Id.* Thus, this Court concluded that the BIA did not exceed the parameters of the authority delegated by the Act, and that the Court of Appeals erred in ordering the case reopened.

In stark contrast, here, the Attorney General's interpretation of Section 241(a)(1)(H) renders the phrase "otherwise admissible" meaningless and is inconsistent with the legislative history and development of the provision. As the discussion above demonstrates, no matter the context, when the interpretation of a statutory provision is at issue, it is the language of the statute, and its legislative history, development and purpose that are the decisive considerations. See also *INS v. Phinpathya*, 464 U.S. 183 (1984) (*rejecting the Court of Appeals construction of the continuous-physical-presence requirement of Section 244(a) of the Act and finding that such a construction was contrary to the plain meaning of the statute and the intent of Congress.*)

Likewise, a closer look at *United States v. Alaska*, 503 U.S. 569, 576 (1992), a case relied upon by the Petitioner for the proposition that she has unfettered discretion to grant or withhold relief from deportation, reveals that it, too, lends support to the decision of the Court of Appeals in this case. In *United States v. Alaska*, this Court examined Section 10 of the Rivers and Harbors Appropriation Act (RHA) to determine whether the Secretary of the Army acted within his discretion in conditioning approval of

the construction of a port in Nome, Alaska on a disclaimer by the State of Alaska relating to a potential change in the federal-state boundary as a result of the project. *Id.* at 572. Ultimately, this Court determined that the Secretary acted within his discretion, but only after engaging in the required statutory construction analysis, which the Attorney General claims is unnecessary in this case.

First, this Court looked to the language of Section 10 itself to determine whether it contained any criteria by which the Secretary was to make an authorized decision. *Id.* at 576. Unlike the language of Section 241(a)(1)(H), the language of Section 10 did not contain any limits on the Secretary's discretion. Next, this Court looked to the legislative history of Section 10 to determine whether it contained a "hint" of whether the drafters sought to vest in the Secretary the apparently unbridled authority the plain language of the statute seemed to suggest. *Id.* Unlike this case, the legislative history and statutory antecedents offered little insight into the intent of Congress.

Thus, only *after* examining the plain meaning of the statute and its legislative history and *finding no limits* on the Secretary's discretion, did this Court conclude that the Secretary acted within the bounds of the discretion conferred upon him by the statute. In marked contrast, here, as set out in great detail in the Respondent's Brief, an examination of the plain meaning of the statute, as well as its legislative history, development and purpose, reveals that the Attorney General exceeded the authority to make family waiver determinations delegated to her by the statute because she considered the very elements

of fraud in making her determination that the Act itself precludes from consideration.

The Attorney General's analogies to other waiver provisions contained in the INA are equally unpersuasive. Specifically, the analogies to waivers under Section 212(c) and suspensions of deportation under Section 244(a) are inappropriate because the language, history and purpose of those sections are so unlike that of Section 241(a)(1)(H). Those provisions do not contain the "otherwise admissible" language of 241(a)(1)(H).[12]

It is well recognized that:

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Cardoza-Fonseca, 480 U.S. at 432; *quoting Rusello v. United States*, 464 U.S. 16, 23 (1983), *quoting U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Thus, the fact that only Section 241(a)(1)(H) contains the language "otherwise admissible" indicates that the sections differ in meaning and application and the Attorney General's analogies between the sections are false.

---

[12] A detailed discussion of the differences in the language, history and purpose of sections 212(c), 241(a)(1)(H) and 244, is set forth in Section IV of Respondent's Brief.

B. OUR SYSTEM OF GOVERNMENT REQUIRES THE JUDICIARY TO POLICE THE PARAMETERS OF THE AUTHORITY DELEGATED TO AGENCIES.

Under our system of separation of powers, independent judicial review is required to insure that the wielders of governmental power are subject to the limits of law. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 938 (1988). The applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary. *Id.*; see *The Federalist No. 78* (A. Hamilton) (C. Rossiter ed. 1961). This is the role filled by Article III courts.

These courts were created because the framers of the Constitution believed that arbitrariness and tyranny could result from the excessive concentration of power in a single branch of government. In fact, James Madison wrote that "[T]he accumulation of all powers, legislative, executive and judiciary, in the same hands * * * [is] the very definition of tyranny." *The Federalist No. 47*, at 301 (J. Madison) (C. Rossiter ed. 1961). Under our system of government, independent judicial review is a constitutionally required check on the authority delegated to executive agencies by Congress.

Toward that end, this Court has stated that, when reviewing agency interpretations of law, courts must not "slip into * * * judicial inertia" or simply "rubber stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), *quoting American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380

U.S. 278, 291-92 (1965). Deference is not abdication and even discretion has its legal limits. See *INS v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in part and dissenting in part); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

Congress, not the Attorney General, enacted Section 241(a)(1)(H) as a humanitarian measure designed to keep families together. Congress, not the Attorney General, defined the outer limits of the Attorney General's authority by making the policy determination that an alien could avoid deportation based on his or her acts of fraud if the alien possessed the requisite family ties. Section 241(a)(1)(H) was designed specifically to allow an alien to escape deportation in spite of his or her fraudulent entry into the country if the alien has a family member who is a U.S. citizen or a lawful permanent resident, and if the alien would have been admissible aside from the alien's acts of fraud or misrepresentations. The inclusion of the language "otherwise admissible", reflects a legislative intent to remove the elements of fraud or misrepresentations from the analysis in making a waiver determination. Thus, the Court of Appeals was merely performing its constitutionally required role of policing the limits of the authority delegated to the Attorney General by the statute when it reversed the BIA's decision in this case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SANDRA E. KUPELIAN
Counsel of Record
CASSIDAY, SCHADE & GLOOR
333 West Wacker Drive
Suite 1200
Chicago, Illinois 60606-1289
(312) 641-3100

Counsel for Amici Curiae
American Immigration
Lawyers Association,
Lawyers Committee for
Civil Rights Under Law of
Texas – Immigrant & Refugee
Rights Project, National
Immigration Project of the
National Lawyers Guild